No. 75-1652

In the Supreme Court of the United States

OCTOBER TERM, 1976

MARION STONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,
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Petitioner challenges his conviction for income tax evasion on the ground that the government failed to establish his opening net worth with reasonable certainty.

Following a jury trial in the United States District Court for the District of Minnesota, petitioner was convicted of willfully attempting to evade income taxes for 1968 and 1969, in violation of 26 U.S.C. 7201. The court sentenced him to three years' imprisonment, three months of which were to be served, and a $10,000 fine. The court required as a condition of probation that petitioner cooperate with the government in the settlement of his civil tax liabilities (Pet. App. A-1 to A-2). The court of appeals affirmed (Pet. App. A-1 to A-8).

The pertinent facts are as follows: Petitioner was engaged in a number of business enterprises, including a cocktail lounge and a used car sales enterprise known as

Stone's Auto Mart. Because petitioner had not maintained adequate records (I-R. 44, 47-49, 63, 81-82),[1] the Internal Revenue Service agents reconstructed his income by means of the net worth method, which measures increases in net worth and compares them against reported taxable income. The prosecution's proof at trial, based on the net worth method (V-R. 29), approved by this Court in *Holland* v. *United States*, 348 U.S. 121, showed that petitioner understated his income by $17,292 and $37,519 for the two years at issue (Pet. App. A-2).

1. Petitioner attacks (Pet. 6-9) the government's net worth computations because the opening net worth figure included a $7,938.91 item for eight automobiles in his used car business inventory (V-R. 39; Govt. Ex. W95-2). He urges that the government failed to establish his opening net worth with reasonable certainty because several witnesses testified that they saw more than eight cars on his lot. However, petitioner told one of the investigating agents on February 28, 1972, that the only cars he had in inventory at the end of 1967, 1968 and 1969 were cars that were "floor planned," *i.e.*, financed (I-R. 78). He also told the agent that he had automobile loans outstanding at Industrial Credit, Liberty State Bank, Commerical State Bank and Gamble's Continental State Bank (*ibid.*).

After carefully checking with all of the local financial institutions (I-R. 49; II-R. 131-132, 140), the agents determined that at the end of 1967 petitioner had eight cars "floor planned" with Industrial Credit, with a total value of $7,938.91 (II-R. 169-170, 172-175, 186-187; V-R. 39-40; Govt. Exs. W17-1, W17-2, W17-5, W95-2).

[1]"R." refers to the seven volumes of transcript of proceedings before the district court and the roman numeral refers to the particular volume.

Moreover, the agents checked the records of the State of Minnesota in an attempt to locate other cars which had been titled in petitioner's name (I-R. 49, 52-54).[2] As a result of their investigation, the agents credited petitioner with an automobile inventory, consisting of eight cars, of $7,938.91 in his opening net worth.

While a number of witnesses testified that they saw more than eight automobiles on petitioner's lot, none of them testified that petitioner owned those other cars (II-R. 196-197; III-R. 36-37, 74-75; VI-R. 30, 34).[3] Moreover, petitioner himself did not testify or offer any evidence which would indicate that he had more than eight cars in inventory at the beginning of the prosecution period. Under these circumstances, the jury was entitled to accept the government's figure for petitioner's automobile inventory as a reliable element of his opening net worth.

2. Petitioner further argues (Pet. 9-11) that the trial court committed prejudicial error in permitting a revenue agent to testify that in 1960 he referred petitioner's 1958 and 1959 tax returns to the Intelligence Division as a potential fraud case. But petitioner did not object at trial to this evidence on the ground that it was prejudicial. Rather, he challenged it on the ground that the evidence lacked a proper foundation and that it was irrelevant (I-R. 7-8).

At all events, the testimony was not prejudicial. It was preliminary and served as the foundation for relevant testimony by a second revenue agent as to his preparation of an audit report which reflected petitioner's

[2]Petitioner told one of the agents that he never sold any cars which were not titled in his own name (I-R. 73).

[3]Petitioner told one of the agents that he had repossessed a number of cars that were worthless and had junked them (I-R. 77).

net worth at the end of 1959. The second agent testified that in 1961 or 1962 he was assigned to assist a special agent in investigating petitioner's tax liability for 1958 and 1959 (I-R. 13). After the special agent withdrew, he continued the civil audit and prepared a report reflecting petitioner's net worth for 1958 and 1959 (I-R. 13-14, 18-19). The agent then reviewed the report with petitioner's legal representative and petitioner agreed with its findings (I-R. 15-17).

This report (Govt. Ex. W3-2) was used by one of the government's expert witnesses at trial in calculating the funds available to petitioner at the beginning of the prosecution period in order to determine whether petitioner had a cash hoard that could have accounted for the increases in his net worth or his nondeductible personal expenditures (IV-R. 61-66; Govt. Ex. W9-56). It was therefore a necessary step in the process of arriving at an accurate determination for petitioner's opening net worth as of the beginning of 1968. As the court of appeals correctly noted (Pet. App. A-7 to A-8), any harm arising from the first agent's statement that the investigation of petitioner's 1958 and 1959 tax liability was referred to the Intelligence Division for a fraud investigation was rendered harmless by the testimony of the second agent that the Intelligence Division terminated the criminal investigation, and that he proceeded to conduct a civil investigation (I-R. 13, 21-22).

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1976.

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